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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

GORDON B. SAUCERMAN; JOE BENJAMIN; SHARRON BENJAMIN; CLEO FREEMAN,

Petitioners,

v.

GALE NORTON, Secretary of the Interior; KEVIN GOVER, Assistant Secretary for Indian Affairs; ELUID MARTINEZ, Commissioner of Reclamation; WAYNE NORDWALL, Phoenix Area Director for Bureau of Indian Affairs; JANET WONG, Staff Solicitor; WAYNE SUMATZKUKU, Bureau of Indian Affairs Realty Specialist; WILLIAM TITCHYWY, ALLEN ANSPACH; CHEMEHUEVI TRIBAL COUNCIL; ROBERT MOELLER; EDWARD SMITH; DAVID CHAVEZ;; CHEMEHUEVI TRIBAL COUNCIL; DAVID CHAVEZ; EDWARD SMITH; ROBERT MOELLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the "Indian exception" to the Quiet Title Act divest the federal court of subject matter jurisdiction to determine the land status element of *Montana v. United States*, 450 U.S. 544 (1981), as the Ninth Circuit has ruled or is the exception not applicable to a determination of land status as held by the Tenth Circuit in *State of Kansas v. United States, et al.*, 249 F. 3d 1212 (10th Cir. 2001)?

Does a Solicitor's Opinion that the Secretary of the Interior has the discretionary authority to restore "equitable title" to the shoreline of Lake Havasu to the Chemehuevi Indian Tribe create a "colorable claim" in the United States that defeats judicial review of the laws and administrative actions which are the basis of its claim?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

On November 19, 2002, the Ninth Circuit Court of Appeals entered its unpublished opinion affirming the District Court; it appears at Appendix 1a to the petition. The decision of the United States Federal District Court for Arizona is not reported; it appears at Appendix 6a to the petition.

JURISDICTION

The Order sought to be reviewed was entered by the Ninth Circuit Court of Appeals on November 19, 2002. Appendix (App.) at 1a. The time allowed by law for filing a petition for writ of certiorari was extended by Justice O'Connor on February 13, 2003, from February 17, 2003 to and including March 19, 2003. No. 02-A663 petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, Fourteenth Amendment, 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

STATEMENT OF THE CASE

A. Judicial Proceedings

This case began when the Chemehuevi Tribal Court had served on the non-Indian petitioners Complaints to evict them from their cabins on the California shoreline of Lake Havasu. The shoreline area is the designated flood and seep zone right of way retained by the Metropolitan Water District of Southern California and owned by the United States Bureau of Reclamation.

In order to protect their Fifth and Fourteenth Amendment individual rights to due process and equal protection of law and to protect their Fifth Amendment possessory interest rights to their cabins, the Petitioners filed suit in the United States District Court for Arizona to challenge whether the Chemehuevi Tribal Court has civil jurisdiction over their persons and property under *Montana v. United States*, 450 U.S. 544 (1981).

On May 18, 2001, BIA law enforcement officers from the Parker Arizona Agency, enforced the Chemehuevi tribal court eviction orders against the Petitioners Saucerman and Benjamin by removing them from their cabins on the shoreline of Lake Havasu. Petitioner Freeman of Needles Lodge was evicted through the self-help ordinance of the Chemehuevi tribe.

On July 9, 2001, the District Court dismissed the Complaint for lack of subject matter jurisdiction as required by the Ninth Circuit's interpretation of the Indian exception to the Quiet Title Act, 28 U.S.C. § 2409a, under *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139(9th Cir. 1987) *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989). App. 6a. Because the Order dismissing the case failed to address the new Supreme Court cases of *Atkinson v. Shirley*, 532 U.S. 645 (2001) and *Nevada v.*

Hicks, 533 U.S. 353 (2001), petitioners filed a Motion for Reconsideration which was denied on February 7, 2002, during the briefing to the Ninth Circuit Court of Appeals. All of the issues raised in the Motion for Reconsideration were briefed in the Appeal.

The Ninth Circuit Court of Appeals affirmed the District Court's dismissal, relying solely on the Lindgren Solicitor's Opinion of August 15, 1974, as giving the Chemehuevi Indian tribe a "colorable claim" to title to the Lake Havasu shoreline. All other claims, including the civil rights claims to enforce the right of the petitioners to challenge tribal civil court jurisdiction over them were dismissed because of lack of subject matter jurisdiction under the Indian exception to the Quiet Title Act, 28 U.S.C. § 2409a(a). App. 1a.

B. Factual Background

The facts relating to this case began in 1907 when the Indian Service acted to create an Indian reservation for the Chemehuevi Indian Tribe in an area already reserved for the Reclamation Service. The dispute between the Reclamation Service and Indian Service was still unresolved in 1936 when the Parker Dam was being completed and the reservoir that is now Lake Havasu was filling with the waters of the Colorado River.

In 1936, Solicitor Margold wrote an Opinion clarifying the remaining Chemehuevi Tribal claims. Congress used the Margold Opinion to create a final resolution of the Chemehuevi claims in the Parker Dam Act of 1940, 54 Stat. 744. The Act extinguishes "all right, title and interest" of the Chemehuevi Indian Tribe to the lands needed for the reclamation project. All remaining tribal claims were extinguished in Indian Claims Commission Cases No. 351 and 351-A. Petitioners' cabins were built on the designated flood and seep right

of way of the reclamation project in the late 1940's under land use permits.

The Chemehuevi Indian Tribe is one of the five tribes for which the United States intervened in *Arizona v. California*, Orig. No. 8. In 1974, a new Solicitor's Opinion asserted that the Secretary of Interior has continuing discretionary authority from the Parker Dam Act to review the lands needed for reclamation purposes. The Lindgren Solicitor's Opinion was published in the Federal Register for August 15, 1974. 11 Op. Solic. 2071.

Within months of the publication of the Lindgren Opinion, a lawsuit entitled *Havasu Landing, Inc., et al. v. Rogers C.B. Morton*, No. CV 74-3565-EC, was filed by the non-Indian residents of the California shoreline. Attorneys for the Secretary of Interior claimed that a Secretarial Order was executed on August 15, 1974, which had restored "equitable title" of the California shoreline of Lake Havasu to the Chemehuevi Indian Tribe while also protecting the valid existing property rights of the non-Indians. The case was settled by agreement.

The cabin owners attempted to enforce the settlement agreement in *Havasu Landing Homeowners Assoc. et al. v. Babbitt*, 74 F.3d 1245 (9th Cir. 1996). The case was dismissed under the Indian Exception to the Quiet Title Act for lack of subject matter jurisdiction.

Then in 1992, the Department of Interior filed suit on behalf of the Chemehuevi Indian Tribe for trespass and ejectment against Havasu Landing mobile home residents who leased lots in *United States v. Jorgensen*, et al., 116 F.3d 1487 (9th Cir. 1997). Three different Secretarial Orders were alleged during the course of the litigation. The Department of Justice attorneys never produced any Secretarial Order. The Ninth Circuit decided that the California shoreline where the non-Indians reside is federal land.

Following the *Jorgensen* ruling, the Chemehuevi Tribe filed an application with the Bureau of Land Management (BLM) for a trust patent for the lands taken by the Parker Dam Act. This application is indefinitely pending. The BLM accepted permit renewal applications in February 2000 for the non-Indians on the shoreline that are also still pending. All of these facts are stated in the Complaint.

REASONS FOR GRANTING THE PETITION

This Court should resolve the conflict that exists between the Tenth and Ninth Circuit Courts of Appeal as to whether a "land status" element implicates the title of the land. This Court is the only court that can reverse the Ninth Circuit's *Metropolitan Water District* rationale substituting "colorable claim" for the plain language of the Indian exception to the Quiet Title Act, 28 U.S.C. § 2409a(a). *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989).

I. THE CONFLICT OVER LAND STATUS

The Tenth Circuit has ruled in *State of Kansas v. United States of America, et al.*, 249 F.3d 1213 (10th Cir. 2001) that an inquiry and findings as to "land status" for the Indian Gaming Regulatory Act (IGRA) does not divest a federal district court of subject matter jurisdiction under the Indian exception of the Quiet Title Act (QTA), 28 U.S.C. § 2409a(a). The Ninth Circuit misapplied the Indian exception to the Quiet Title Act in this case to divest subject matter jurisdiction to decide the land status element required by *Montana v. United States*, 450 U.S. 544 (1981).

The QTA reads:

> 'The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest.... This section does not apply to trust or restricted Indian lands....' 28 U.S.C. § 2409a(a).

The Tenth Circuit Court of Appeals is correct in *State of Kansas v. United States of America, et al.*, 249 F.3d 1213 (10th Cir. 2001) that the land status element of the Indian Gaming Regulatory Act (IGRA) does not conflict with the Indian Exception to the Quiet Title Act. Both IGRA and the *Montana* test require only that a Court decide whether the Indian tribe is asserting jurisdiction over Indian or non-Indian land. The simple determination of whether the status of the land is Indian or non-Indian violates the Indian exception of the QTA according to the Ninth Circuit. *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989).

Regardless of the land status determination, this lawsuit will not affect title to the tract. *State of Kansas* at 1225. The Tenth Circuit concluded that since the title was unaffected, the QTA, 28 U.S.C. § 2409a, did not limit judicial review of the agency decision under 5 U.S.C. § 702. *State of Kansas* at 1225. The Ninth Circuit dismissed this case pursuant to the Indian exception to the QTA without ever examining the land status. App. 3a-4a.

In *State of Kansas v. United States*, defendants claimed that because (1) the State's action is in effect one "to adjudicate a disputed title to real property in which the United States claims an interest," and (2) the tract constitutes "restricted Indian lands," the Government has not waived its sovereign immunity

from suit. *State of Kansas* at 1224. The Tenth Circuit confronted this circular reasoning by not allowing the United States to characterize the *Kansas* suit as arising under the QTA by *presupposing* that the land is *de jure* "Indian lands." *State of Kansas* at 1224.

The Tenth Circuit proceeded to determine whether the land in question was "trust or restricted Indian land" by examining the land status before determining whether the QTA applied. The Tenth Circuit concluded that the land was not Indian land and therefore, the QTA was not applicable.

The Ninth Circuit decision assumes defendant's position (1) that petitioners suit is really an attempt to litigate the title to the shoreline. App. 3a-4a. No claim is made in the Complaint challenging the title of the United States to the shoreline nor could it be without challenging the valid existing rights that are the basis of petitioners standing to sue. Additionally, petitioners brought suit in the Federal District Court for Arizona which has no subject matter jurisdiction to quiet title to any land in the state of California. *Wildman v. United States*, 827 F.2d 1306, 1307 (9th Cir.1987), citing *Sherrill v. McShan*, 356 F.2d 607 (9th Cir.1966).

The Ninth Circuit's application of *Metropolitan Water District* in this case presupposes (2) that the Lindgren Solicitor's Opinion makes the shoreline lands *de jure* "Indian lands" to divest all subject matter jurisdiction of the federal courts. App. 3a-4a. The decision intentionally ignores the specific factual allegations that the shoreline is owned in fee title by the Bureau of Reclamation (BOR) and that the Ninth Circuit itself in *United States v. Jorgensen*, et al., 116 F.3d 1487 (9th Cir. 1997), held that this shoreline is federal land.

The Ninth Circuit's circular reasoning can be broken by requiring the court to decide the land status of the shoreline before deciding whether the QTA applies as the Tenth Circuit did in *State of Kansas v.*

United States of America, et al., 249 F.3d 1213 (10th Cir. 2001). This includes adjudicating reservation boundaries which is conceptually distinct from adjudicating title to the same land. *State of Kansas* at 1225, citing *Navajo tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987). The Ninth Circuit and the trial court "fail to appreciate the discrete concepts of land status and land title." *State of Kansas* at 1225.

II. THE NINTH CIRCUIT ERRS BY SUBSTITUTING "COLORABLE CLAIM" FOR "TRUST OR RESTRICTED INDIAN LANDS"

The Ninth Circuit cites *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989), to divest the federal court of subject matter jurisdiction by holding that the Lindgren Solicitor's Opinion "met the burden" to hold that a colorable claim of Indian land exists under the Indian exception of the QTA. App. 3a-4a. The Ninth Circuit follows its own rationale rather than applying the interpretation of the Indian exception of the QTA made by this Court that the immunity is not waived where the land either is held in "trust or [is] restricted Indian lands." *Block v. North Dakota*, 461 U.S. 273, 275-6 (1983).

Metropolitan Water District follows and extends the rationale of *Wildman v. United States*, 827 F.2d 1306 (1987) interpreting the Indian exception to the QTA. *Wildman* was a preemptive action brought to quiet title to lands moved by avulsion from the California shoreline of the Colorado River to the Arizona shoreline adjoining the Fort Mojave Indian Reservation. The Ninth Circuit found that

> "Nothing in the statute or its history suggests that the United States was to be

> put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians....The immunity of the government applies whether the government is right or wrong." *Wildman* at 1309.

Using the colorable claim interpretation, the *Metropolitan Water District* opinion extended this QTA rationale even farther by preventing Section 702 of the Administrative Procedures Act from waiving the sovereign immunity of the United States. *Metropolitan Water District* at 143. The Ninth Circuit then prohibited tribal boundary determinations under the QTA by concluding that "The effect of a successful challenge would be to quiet title in others than the tribe." *Metropolitan Water District* at 143.

The resulting QTA rationale of the Ninth Circuit prevents non-Indians from being able to protect their property in a court under the Ninth Circuit. E. John Athens, Jr., *The Ninth Circuit Errs Again: The Quiet Title Act as a Bar to Judicial Review*, 19:2 Alaska Law Review 433 (2002). As the law review article states, "In other jurisdictions discussed below, courts have held that the Indian lands exception to the QTA does not bar judicial review of agency decisions that initially give rise to the claim that the property is Indian land. *The Ninth Circuit Errs Again* at 446. "There will be no judicial review based on constitutional claims, statutory claims, or factual claims, as long as the government can identify some rationale, even an incorrect one, for the agency decision. Without a bright line definition of 'colorable claim,' the federal government will be compelled by its trust duty to protect Native allotments to seek dismissal on the basis of the Indian lands exception to the QTA of

virtually any claim filed by Alaska, no matter how meritorious." *The Ninth Circuit Errs Again* at 458-9.

As this case demonstrates, using its QTA rationale the Ninth Circuit can make the QTA Indian exception apply even when there is a direct diminishment of the reservation by Congress, there are constitutional claims, the land is fee titled in the United States and only a Solicitor's Opinion of continuing discretionary authority exists to make a claim that the land is colorably Indian land. App. 3a-5a. The rationale of *Metropolitan Water District* and *Wildman* was approved by this Court in its *per curiam* order in *California v. United States*, 490 U.S. 520 (1989). Only this Court can correct the Ninth Circuit's misapplication of the Indian exception to the QTA.

III. JURISDICTION TO DETERMINE LAND STATUS DOES NOT REQUIRE A WAIVER OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES

As previously stated, this case was brought to determine whether the Chemehuevi Tribal Court has civil jurisdiction to evict these non-Indians from their shoreline cabins on Lake Havasu under *Montana v. United States*. The petitioners alleged that the shoreline lands are not "trust or restricted Indian lands" because Congress specifically took "all right, title and interest" to the lands starting from the shoreline down into the river valley in the Parker Dam Act of 1940 for the Boulder Canyon Reclamation Project. 54 Stat. 744. Once taken for reclamation purposes, the Secretary of Interior is specifically prohibited by Congress from restoring lands within federal reclamation projects to Indian reservations or placing those lands into trust status for a tribe. 25 U.S.C. § 463 and § 575.

The jurisdiction of the federal courts to decide which sovereign has jurisdiction over a specific piece of

land once encompassed within Indian reservation boundaries has been upheld by this Court in numerous cases. See generally *Solem v. Bartlett*, 465 U.S. 463 (1984), *Atkinson v. Shirley*, 532 U.S. 645 (2001). None of these cases affected the title to the land.

Indian tribes and tribal members have often claimed tribal jurisdiction still exists over an area when they attempt to avoid state jurisdiction over criminal charges or to avoid state regulatory enforcement. *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Hagen v. Utah*, 510 U.S. 399 (1994), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

Tribal members using tribal courts have also asserted jurisdiction over non-members and non-Indians for harm that occurred within reservation boundaries, requiring the federal courts to determine the extent of tribal court jurisdiction over particular tribal court claims. *Duro v. Reina*, 495 U.S. 676 (1990), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999).

In all of the cases cited above, the federal courts had subject matter jurisdiction to make the land status determinations to provide a judicial resolution of the disputed claims without a waiver of the sovereign immunity of the United States.

In *South Dakota v. Bourland*, 508 U.S. 679 (1993), this Court expanded this jurisdiction to specifically include "the question of jurisdiction over non-Indians... the only question before us is whether the Tribe may regulate non-Indians who hunt and fish in the taken area." *Bourland* at 685, Fn 6.

The Parker Dam Act contains express diminishment language taking "all right, title and interest" of the Chemehuevi Indian Tribe to the project lands. *South Dakota v. Bourland* is on point for this case disputing tribal jurisdiction over non-Indians on the shoreline of Lake Havasu. This case has stronger facts

than *Bourland* because no tribal rights were reserved in the Parker Dam Act and no treaty ever existed between the Chemehuevi Tribe and the United States. Using the rationale of *Metropolitan Water District*, the Ninth Circuit divested itself of subject matter jurisdiction to decide this case. App. 3a-4a.

The Ninth Circuit's QTA rationale has the potential to nullify this Court's statement that "Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). The Ninth Circuit's rationale may be applied to nullify any decision of this Court regarding tribal jurisdiction over non-Indians with which it does not agree including *Montana v. United States* and any opinions of this Court interpreting *Montana* if this decision is allowed to stand.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: March 19, 2003

Respectfully submitted,

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(Any footnotes trail the end of each document.)
No. 01-17009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GORDON B. SAUCERMAN; JOE BENJAMIN; SHARRON BENJAMIN; CLEO FREEMAN,
Plaintiffs-Appellants,

v.

GALE NORTON, Secretary of the Interior; KEVIN GOVER, Assistant Secretary for Indian Affairs; ELUID MARTINEZ, Commissioner of Reclamation; WAYNE NORDWALL, Phoenix Area Director for Bureau of Indian Affairs; JANET WONG, Staff Solicitor; WAYNE SUMATZKUKU, Bureau of Indian Affairs Realty Specialist; WILLIAM TITCHYWY, ALLEN ANSPACH; CHEMEHUEVI TRIBAL COUNCIL; ROBERT MOELLER; EDWARD SMITH; DAVID CHAVEZ;; CHEMEHUEVI TRIBAL COUNCIL; DAVID CHAVEZ; EDWARD SMITH; ROBERT MOELLER,
Defendants-Appellees.

November 5, 2002 **, Submitted,
San Francisco, California

November 19, 2002, Filed

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JUDGES:
Before: McKEOWN and PAEZ, Circuit Judges, and POLLAK, *** Senior District Judge.

OPINION:

MEMORANDUM *

Before: McKEOWN and PAEZ, Circuit Judges, and POLLAK, *** Senior District Judge.

Appellants Gordon B. Saucerman, Joe Benjamin, Sharron Benjamin, and Cleo Freeman (collectively the "former permittees"), former occupants of cabins on the western shore of Lake Havasu in California (the "shoreline area"), filed this action against the Chemehuevi Tribal Council, Chemehuevi tribal officials,

and various federal government officials after tribal officials acted to enforce a self-help eviction ordinance. The complaint, alleging violations of the Administrative Procedures Act (APA), 5 U.S.C. § § 701-706, a taking of property in violation of the Fifth and Fourteenth Amendments, and constitutional violations under 42 U.S.C. § § 1983 and 1985, was dismissed for lack of subject matter jurisdiction. We affirm.

Congress established the Quiet Title Act of 1972 as the exclusive means to adjudicate a disputed title to real property in which the United States claims an interest. 28 U.S.C. § 2409a. The Act expressly reserves sovereign immunity in disputes involving property held in trust for Indian tribes. See id. at. § 2409a(a); United States v. Mottaz, 476 U.S. 834, 843, 90 L. Ed. 2d 841, 106 S. Ct. 2224 (1986).

The former permittees contend that the Quiet Title Act is not applicable because this is not a title dispute. Their argument is precluded by our decision in Metropolitan Water District of Southern California v. United States, 830 F.2d 139, 143 (9th Cir. 1987), aff'd, 490 U.S. 920, 104 L. Ed. 2d 981, 109 S. Ct. 2273 (1989) (holding that the Quiet Title Act displaces APA review of administrative decisions affecting title to land in which the United States claims an interest based on the land's status as trust or restricted Indian land). Because "the effect of a successful challenge would be to quiet title in others than the tribe," the former permittees may not avoid the Indian lands exception to the Quiet Title Act. Id.

Preservation of immunity under the Indian lands exception to the Act applies as long as the government has a "colorable claim" regarding its title as trustee to the land at issue. Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987). This burden has been met. See, e.g., Authority of Secretary to Determine Equitable

Title to Indian Lands, 11 Op. Solic. 2071, 2071 (Aug. 15, 1974) (recognizing that the "Chemehuevi Reservation was established in 1907" and concluding that Secretary of the Interior has authority to grant equitable title of disputed lands to Chemehuevi tribe); Act of July 8, 1940, 54 Stat. 744 (authorizing Secretary of Interior to designate Chemehuevi Reservation lands for construction of Parker Dam); see also Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047, 1050 (9th Cir.), rev'd on other grounds, 474 U.S. 9, 88 L. Ed. 2d 9, 106 S. Ct. 289 (1985) ("Since time immemorial, the Chemehuevi Indian Tribe has resided in the Chemehuevi Valley ... in the area that is now part of the Chemehuevi Indian Reservation."). Therefore, the district court properly dismissed the former permittees' APA claims.

Although referenced in passing, the former permittees did not offer in their opening brief any arguments specifically directed toward the takings claim and thus we decline to address it. See Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review.") (citations omitted).

The remaining claims allege violations of 42 U.S.C. § § 1983 and 1985 by both tribal and federal officials. Indian tribes are generally immune from suit in federal court unless they or Congress have waived their immunity. See United States v. Oregon, 657 F.2d 1009, 1012-13 (9th Cir. 1981). No such waiver is present in this case, and this immunity extends to tribal officials acting in their official capacity within their scope of authority, as alleged in the complaint here. See Imperial Granite

Co. v. Pala Tribe of Mission Indians, 940 F.2d 1269, 1271 (9th Cir. 1991); Oregon, 657 F.2d at 1012 n.8. The remaining claims against the tribal officials were therefore appropriately dismissed.

It was also proper to dismiss the remaining claims against the federal officials. It is well established that the United States is immune from suit absent its express consent. See United States v. Mitchell, 445 U.S. 535, 538, 63 L. Ed. 2d 607, 100 S. Ct. 1349 (1983) ("A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.") (internal quotations and citation omitted). This immunity cannot be avoided by simply naming federal officers and employees as defendants. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). By their terms, § § 1983 and 1985 contain no explicit waiver of sovereign immunity by the federal government. See 42 U.S.C. § § 1983 and 1985.

AFFIRMED.

Footnotes

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

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No. C V01-182-PHX-SRB

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GORDON B. SAUCERMAN et al.,
Plaintiffs

v.

Bruce Babbitt, et al.,
Defendants.

ORDER

Pending before the Court are Defendants' Motion to Dismiss for lack of subject matter jurisdiction and/or failure to join an indispensable party (doc. 22), and Defendants' Motion to Dismiss for improper venue (doc. 28). The Court now rules on the motions.

I. BACKGROUND

Plaintiffs are individuals who claim leasehold interests on federally owned land on the western shoreline of Lake Havasu in California. Plaintiffs filed suit against various defendants, including federal officials, the Chemehuevi Tribal Council, and Chemehuevi Tribal officials. The Chemehuevi Tribe maintains that title to the land occupied by Plaintiffs is held by the United States in trust for the Tribe and has sought to enforce a self-help eviction ordinance against Plaintiffs. Plaintiffs seek a determination from the Court as to whether the Chemehuevi Tribe has jurisdiction over Plaintiffs and their property.

The relevant facts and procedural history are as follows.

In July, 1940, Congress authorized the Secretary of the Interior to designate certain lands within the Chemehuevi Reservation to be taken in aid of the construction of the Parker Dam Project. On November 25, 1941, the Secretary of the Interior approved a description of lands to be withdrawn which included lands within the Reservation below the 465-foot contour line. Following the completion of Parker Dam and creation of Lake Havasu, the water level did not rise up to the projected 465-foot contour line. The lake level rose to the 450-foot contour line, resulting in a strip of shoreline above the lake level owned by the United States, the land at issue in this action.

This strip of shoreline was administered by the Bureau of Land Management and the United States Fish and Wildlife Service up until 1974. During this time period, the United States issued permits to non-Indians to build cabins on this land. Plaintiffs are non-Indians who had use permits granted by the United States Fish and Wildlife Service before 1974 and occupy cabins on this shoreline area.

On November 1, 1974, the Secretary of the Interior issued an order restoring equitable title to the Chemehuevi Tribe to certain lands within the Reservation previously acquired by the United States in 1941. Included in these lands was the shoreline area in dispute – the shoreline between thy 450-foot and 465-foot contour lines.

On November 17, 2000, the Chemehuevi Tribe filed a complaint against Plaintiffs in Chemehuevi Tribal Court, alleging that Plaintiffs refused to vacate tribal land after their permits had expired and that they continued to occupy the land without the consent of the Tribe or the Secretary of the Interior in violation of tribal and federal

law. Plaintiffs failed to appear and defend and default judgments have been entered against them.

On January 31, 2001, Plaintiffs filed a Complaint for declaratory and injunctive relief and for violation of their civil rights. Plaintiffs' first through third causes of action allege violations of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. Plaintiffs generally allege that legal title to the lands in question is not held in trust for the Tribe by the United States. Plaintiffs allege that these lands were expressly and permanently diminished by the Parker Dam Act of 1940. Plaintiffs further allege that the Secretary of the Interior was without the authority to place the lands in trust for the Chemehuevi Tribe, and therefore, the Chemehuevi Tribal Council and Tribal court cannot exercise valid jurisdiction over Plaintiffs or their property.

Plaintiffs' fourth claim for relief alleges the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs' fifth and sixth claims for relief allege violations of 42 U.S.C. § 1985. In their prayer for relief Plaintiffs request the Court to order the production of the entire administrative record; to enjoin the tribal council from seizing cabins through enforcement of the Tribe's self-help ordinance; to enjoin the tribal council from proceeding in tribal court to evict Plaintiffs; and to declare the Parker Dam Act of 1940 and payment of compensation to members of the Tribe as constituting a permanent diminishment of the Chemehuevi Reservation.

On February 14, 2001, Plaintiffs filed an Application For Temporary Restraining Order. In their application, Plaintiffs requested a temporary restraining order to prevent "any further action by any Defendant to claim that the Secretary of the Interior (SOI) restored

equitable title to the Chemehuevi Indian Tribe (Tribe) to the lands occupied by Plaintiffs until Defendants produce for the inspection of this Court and Plaintiffs the entire administrative record regarding the proposed Secretarial Orders of 1974 and certified Title Status Report of the lands which are the subject of this suit." The Court heard oral argument on Plaintiffs' Application for Temporary Restraining Order on February 22,2001. Plaintiff's Application was denied. At the conclusion of the hearing, the parties entered into a stipulation which provided that:

neither the Tribe, nor the Tribal Council will take any action to execute on a . . . Writ of Assistance or any order of this Court (the Tribal Court) without giving counsel for the plaintiff notice that the order has been entered at least 24 hours before any execution takes place in order to allow sufficient time for application, if appropriate, for a Temporary Restraining Order to prevent any dispossession of the plaintiffs.

On May 8, 2001, the Clerk of the Chemehuevi Tribal Court issued a Writ of Assistance to enforce the terms of the default judgments entered against Plaintiffs. On May 11, 2001. Plaintiffs filed a second Application for Temporary Restraining Order requesting the Court enjoin the Chemehuevi Tribal Court from executing its Writ of Assistance. The Court heard oral argument on Plaintiffs' Application for Temporary Restraining Order on May 15, 2001. Finding that Plaintiffs failed to exhaust tribal court remedies, the Court denied Plaintiff's Application for Temporary Restraining Order.

II. DISCUSSION

The Tribal and federal Defendants move to dismiss for lack of subject matter jurisdiction and for failure to join

a party under Rule 19 of the Federal Rules of Civil Procedure. Defendants assert the following arguments: (1) Plaintiffs' suit against the Tribal Defendants is barred by the Tribe's sovereign immunity; (2) the Tribe is an indispensable party; (3) Plaintiffs have failed to exhaust tribal administrative and tribal court remedies; (4) suit against the federal Defendants is barred by the United States' sovereign immunity under the Quiet Title Act; and (5) Plaintiff's claims are barred by res judicata. The federal Defendants also move to dismiss for improper venue.

When considering a motion to dismiss pursuant to Rule 12(b)(1), a district court is not restricted to the face of the pleadings, but may review evidence such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. Federal Deposit Insurance 885 F.2d 633 635-36 (9th Cr. 1989).

Plaintiffs assert that the Court has subject matter jurisdiction to determine whether the Chemehuevi Tribal Court exceeded its jurisdiction by exercising judicial power over Plaintiffs, who are non-Indian parties. In Strate v. A-1 Contractors, 520 U.S. 438 (1997), the Supreme Court held that a tribal court lacked jurisdiction over litigation between nonmembers arising out of a vehicle accident on a state highway within the reservation. Holding that a right-of-way was the equivalent of non-Indian owned fee land, the Court held that the tribe therefore lacked jurisdiction under Montana v. United States, 450 U.S. 544 (1981). In Montana v. United States, the Supreme Court resolved the issue of whether a tribe lacked the power to regulate hunting and fishing by non-Indians on non-Indian owned fee land within the reservation. In holding that the tribe was without such regulatory authority, the court in Montana set forth the general rule that Indian tribes lack

civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: (1) nonmembers with consensual relationships with the tribe or its members; or (2) conduct that threatened or directly affected the tribe's political integrity, economic security, health or welfare.

The Court recognizes that federal courts generally have the authority to determine whether a tribal court has exceeded the limits of its jurisdiction. See National Farmers Union Ins. Cos. v. Crow Tribe, 471, U.S. 845, 852 (1985). However, the United States Supreme Court has mandated the exhaustion of tribal court remedies as a prerequisite to a federal court's exercise of jurisdiction.fn1 See Id. at 854-57; Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987). In National Farmers Union, the Supreme Court recognized that "Congress is committed to a policy of supporting tribal self-government and self-determination." 471 U.S. at 856. "That policy," the Supreme Court stated, "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge." Id. A federal court is directed to "stay its hand" until the tribal court has had a "full opportunity to determine its own jurisdiction" and to correct any errors it may have made. Id. at 857; Iowa Mutual, 480 US. at 16.

In November, 2000, the Chemehuevi Tribe filed a complaint against Plaintiffs in Chemehuevi Tribal Court alleging that they occupied tribal land in violation of tribal and federal Law. Plaintiffs failed to appear and defend in that action and default judgments were entered against them. In January, 2001, Plaintiffs filed suit in federal court requesting a determination whether the Tribal Court could exercise valid jurisdiction over Plaintiffs and their property. As the Court held in its

Order denying Plaintiffs' Application for a Temporary Restraining Order, Plaintiffs have failed to exhaust tribal court remedies before proceeding to federal court. Nonetheless, even if Plaintiffs were allowed to proceed in federal court after exhausting tribal court remedies, the Court finds that Plaintiffs claims are barred by the Quiet Title Act.

The Defendants claim that the Court lacks subject matter jurisdiction because the government is immune from suit under the Quiet Title Act, 28 U.S.C. § 2409a. "The QTA permits the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land. However, when the United States claims an interest in real property based upon that property's status as trust or restricted Indian lands, the Government is immune from suit under the QTA." Metropolitan Water Dist. of Southern Cal. v. United States, 830 F.2d 139, 143 (9th Cir. 1987) aff'd sub nom. California v. United States, 490 U.S. 920 (1989).

Plaintiffs argue that the QTA does not govern this action because they seek only a determination by the Court whether the Tribal Court has jurisdiction over Plaintiffs and their property, which would not affect title to the lands in question. Plaintiffs claim that a decision whether the Parker Dam Act of 1940 constituted a diminishment of the lands in question would only determine the status of the land and would not affect any claim of title to the land.

In Metropolitan, the court considered whether the QTA exception to Indian lands applied to reservation boundary disputes between a tribe and a water district. 830 F.2d at 141. While recognizing that the water district was "not seeking to quiet title in itself," the court held that the QTA applied because the water district sought

"a determination of the boundaries of the Reservation" and "[t]he effect of a successful challenge would be to quiet title in others than the Tribe." Id. at 143. The Ninth Circuit later commented that "Metropolitan Water District expanded the application of the QTA to govern suits involving plaintiffs who, while not seeking to quiet title in themselves, might potentially affect the property rights of others through successfully litigating their claims." Alaska v. Babbitt, 38 F.3d 1068, 1074 (9th Cir.1994).

While Plaintiffs do not challenge legal title to the lands at issue, they do seek a declaration that the land is not held in trust by the United States for the benefit of the Tribe. The Court finds that this attempt to divest the Tribe of their equitable title to the land is sufficient to invoke the application of the QTA. The effect of a successful claim by Plaintiffs would vest equitable title "in others than the Tribe." Metropolitan, 830 F.2d at 143.

The QTA's preservation of immunity for the government applies without regard to the ultimate validity of the government's assertions of title. The Ninth Circuit has stated that "[t]he immunity of the government applies whether the government is right or wrong." Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987). "The very purpose of the doctrine is to prevent a judicial examination of the merits of the government's position." Id. Further, "[n]othing in the [QTA] or its history suggests that the United States was to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians," Id.

In this case, the government has a "colorable claim" regarding its title as trustee to the land at issue. The

November 1, 1974 Order of the Secretary of the Interior on its face restored equitable title to the Chemehuevi Tribe to all the lands within the Reservation previously taken by the United States in 1941. A Department of Interior opinion from 1974 recognized the existence of the Chemehuevi Reservation and found that the Secretary of Interior has the authority to determine, establish and confirm that the Chemehuevi Tribe has equitable title to the lands in question. See Authority of Secretary to Determine Equitable Title to Indian Lands, 11 Op. Solic. 2071, 2072 (Aug. 15, 1974) (exhib. 7 of Plaintiffs' Notice of Application for Temporary Restraining Order).

Plaintiffs have filed suit under the Administrative Procedures Act, 5 U.S.C. §§ 701-706, alleging that federal Defendants acted in excess of their authority by placing the lands in question in trust for the Chemehuevi Tribe. Any claim by Plaintiffs that an "officer's suit" brought under the APA provides an independent means to waive the government's sovereign immunity for claims against the government otherwise precluded by the QTA, is without merit.

The Supreme Court has expressly held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property" Block v. North Dakota, 461 U.S. 284, 286 (1983). The Supreme Court stated that if plaintiffs are permitted to avoid the provisions of the QTA by bringing an officer's suit, then, "the Indian lands exception to the QTA would be rendered nugatory." Id. at 284-85.

The Ninth Circuit has also held that a claimant may not circumvent the Indian lands exception to the QTA by obtaining jurisdiction under the APA. State of Alaska v.

Babbitt, 75 F.3d 449, 453 (9th Cir. 1996) (holding officer's suit against the Bureau of Land Management was precluded by the United States' sovereign immunity under Indian lands Exception to the QTA); McIntyre United States 798 F.2d 1408 14 10 11 (9th Cir. 1986) (rejecting action brought under 702 of APA and holding that the QTA is the exclusive means to challenge government's title to real property), rev 'd on other grounds, Fadem v. United Stares, 52 F.3d 202 (9th Cir. 1995); State of Alaska v. Babbitt, 182 F .3 d 672, 674 (9th Cir. 1999) ("a plaintiff cannot avoid the Indian lands exception by obtaining jurisdiction under the Administrative Procedure Act").

For the above reasons, the Court concludes that the Indian lands exception to the QTA preserves immunity of the United States and therefore the federal defendants are immune from suit.

The United States is an indispensable party to any suit brought to establish an interest in Indian trust land. Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991) (citing Minnesota v. United States, 305 U.S. 382, 326 (1939)) In addition, "the United States is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation." Carlson v. Tulalip Tribes of Washington, 510 F.2d 1337, 1339 (9th Cir. 1975). The inability to join the United States as an indispensable party in this case due to immunity from suit, must result in dismissal. Imperial Granite, 940 F.2d at 1272 n. 4. Consequently, Plaintiff's claims against the remaining Tribal Defendants are dismissed.fn2

IT IS ORDERED granting Defendants' Motion to Dismiss for lack of subject matter jurisdiction (doc. 22).

IT IS FURTHER ORDERED dismissing as moot Defendants' Motion to Dismiss for Improper Venue (doc. 28).

DATED this 6th day of July, 2001.

Susan R. Bolton
United States District Judge

Footnotes

fn1 The exhaustion requirement is subject to three exceptions under which litigants may proceed directly to federal court: (1) where assertion of tribal jurisdiction is motivated by harassment or bad faith or (2) where the action is patently violative of express jurisdictional prohibitions; or (3) where exhaustion would be futile due to an inadequate opportunity to challenge the tribal court jurisdiction. National Farmers Union, 471 U.S. at 856 n. 21; see also Strate, 520 U. S. at 459 n. 14.

fn2 The Court also notes that Plaintiffs' Complaint raises serious res judicata problems. In this action Plaintiffs attempt to relitigate the same issues that were raised and decided in Havasu Landing Homeowners Assoc. v. Babbitt No. CV-92-061 84 (C. D. Cal. Feb. 1, 1994) and affirmed by the Ninth Circuit Court of Appeals in Havasu Landing Homeowners Assoc. v. Babbitt, No. CV 92-06184 (9th Cir. Jan. 22, 1996). There, as here, the plaintiffs argued that the lands in question were not part of the Chemehuevi Indian Reservation. The district court in that case dismissed the suit for lack of subject matter jurisdiction on wounds of federal sovereign immunity. While the parties in both cases are not identical, Plaintiff Gordon B. Saucerman was a named plaintiff in the prior litigation. Cleo M. Freeman claims

an interest on behalf of Needles Lodge in this case. Needles Lodge was a named plaintiff in the prior litigation.

Furthermore, Plaintiffs Gordon B. Saucerman and Joe Benjamin entered into a settlement agreement with the Chemehuevi Tribe and the Secretary of the Interior in 1976. Under the terms of the settlement agreement, the parties agreed to dismiss with prejudice the pending lawsuit, Havasu Landing Inc. v. Morton, No. CV-74-3665 (C.D. Cal) filed by plaintiffs, including the Havasu Landing, Inc. and Havasu Homeowners Association, against the Secretary of Interior and the Chemehuevi Tribe. The lawsuit challenged the authority of the Secretary of Interior to restore the equitable ownership of the shoreline to the Chemehuevi Tribe. Under the terms of the settlement agreement, Saucerman, Benjamin and Needles Lodge signed releases, agreeing to release the Tribe and the United States from all claims arising out of or related to the subject matter of the law suit.